BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

JOSEPH W. WOOD Claimant	)	
VS.	)	Docket No. **244,988**
ATCHISON CASTING CORPORATION Self-Insured Respondent	)	

ORDER

Claimant appealed Administrative Law Judge Bryce D. Benedict's Award dated September 19, 2000. The Board heard oral argument on March 7, 2001.

APPEARANCES

Claimant appeared by his attorney, George H. Pearson. The self-Insured respondent appeared by its attorney, John B. Rathmel.

RECORD & STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

On review the claimant contends that he is entitled to a work disability. Claimant contends he was terminated from an accommodated job because he refused to perform job duties which would have violated his permanent work restrictions.

The respondent contends the award should be limited to the claimant's functional impairment because the claimant's termination was for good cause unrelated to his work restrictions. In addition, respondent raised the issues that the award should be modified to a 14 percent functional impairment and that the cost of Clint Wisdom's video deposition should be assessed to the claimant.

At oral argument before the Board, the parties agreed that the claimant's functional impairment is 14 percent. In addition, the claimant stipulated that the cost of the video-taped deposition should be paid by the claimant.

FINDINGS OF FACT & CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, and in addition to the stipulations of the parties, the Board makes the following findings of fact and conclusions of law:

The Administrative Law Judge's award sets out findings of fact that are accurate and supported by the record. It is not necessary to repeat those findings and conclusions herein. The Board adopts the Administrative Law Judge's findings and conclusions as its own as if specifically set forth herein.

It is undisputed that as a result of performing his job duties as an air arc welder the claimant sustained accidental injury due to cumulative trauma arising out of and in the course of his employment with the respondent. Following a course of conservative treatment, an EMG was conducted which confirmed the claimant had bilateral carpal tunnel syndrome and right trigger thumb. Ultimately, the claimant underwent surgical intervention on July 6, 1999. The surgical procedure consisted of bilateral carpal tunnel release with right trigger thumb release.

The claimant was released back to work on July 12, 1999, with restrictions against any lifting and forceful gripping. The respondent accommodated the claimant by placing him in a first shift office position until August 19, 1999, when the claimant advised the respondent that the air-conditioning in the office was bothering his hands. The next day the claimant was transferred to another job on the first shift working on the shaker table with a co-employee. The shaker table job required the sorting of pieces of metal which generally weighed from one half pound to 30 pounds and on occasion very heavy pieces of metal were on the table. There was a crane operated magnet to lift the heavier items.

The respondent was provided restrictions from the claimant's doctor which indicated that he should not return to the air arc welding job and further imposed restrictions which limited the claimant to 30 pound occasional lifting and no lifting over 50 pounds.

The claimant was then provided an accommodated job operating a crane on the third shift. It is undisputed that shift preference is based upon seniority and it had taken the claimant three years to move to the first shift. The former union steward, Clint Wisdom, testified that claimant was probably placed back on third shift because there were more job opportunities available on that shift to accommodate somebody with work restrictions.

Nonetheless, the claimant was not pleased with the return to the third shift. Claimant's supervisor, Mr. Atzenweiler, concluded that claimant did not appear to be happy

about working third shift. The claimant's wife testified the claimant was unhappy being returned to the third shift and she further noted that when he expressed his displeasure she had advised him to just quit.

The claimant testified that on September 1, 1999, his supervisor, Mr. Atzenweiler, ordered him to climb a stack of trucks and hook chains around them. The claimant advised his supervisor that he was afraid his hands would not hold him while doing the climbing and he was then instructed to resume his other work. The supervisor's version of the incident differs in that he contends he asked the claimant if he could hook the chains. However, both parties agree that when claimant advised the supervisor of his concern about his hands he was not required to perform that job duty.

On September 3, 1999, the claimant testified the supervisor told him to return to work on the shaker table which the claimant refused to do because he felt it would violate his permanent restrictions. The supervisor's version of this incident also differs. The supervisor testified that at the beginning of work on September 3, 1999, he had instructed the claimant that when claimant wasn't busy operating the crane he was to run the shaker table. The supervisor testified that the claimant responded that he would not run the shaker table because if that was his job he could do that on the first shift.

Later that same evening, the supervisor noted the claimant was not busy operating the crane and called him into the office and again advised claimant that he was to work at the shaker table when he wasn't busy. The claimant again refused to do that job and requested the presence of a union representative. After a private conversation between the claimant and the union representative, the claimant again refused to do the work on the shaker table.

The claimant testified that he couldn't work on the shaker table because it was outside his permanent work restrictions. However, the supervisor stated that the claimant never alleged that the job was outside his work restrictions. The claimant was ultimately terminated for refusing the supervisor's direct order.

An employee is precluded from receiving a work disability if the employee returns to accommodated work after an injury and is fired for cause.[1]

The dispositive issue in this case is whether the claimant's termination from his accommodated employment was for good cause unrelated to his permanent work restrictions.

Resolution of this issue is dependent upon which version of the events that occurred on the night of September 3, 1999, is adopted. In resolving this factual dispute it is

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[1] *Ramirez v. Excel Corp.*, 26 Kan. App.2d 139, 979 P.2d 1261, *rev. denied* 267 Kan. __ (1999).

significant that the supervisor's version of the events the evening of September 3, 1999, is substantially corroborated by the testimony of two individuals.

As previously noted, the claimant's supervisor, Mr. Atzenweiler, testified that at the beginning of the shift on September 3, 1999, he had advised claimant that when he was not busy operating the crane he was to work at the shaker table. The supervisor testified that claimant responded by saying that he would not do the shaker table job. The claimant testified that he told the supervisor that he could not do the shaker table job because of his permanent work restrictions. However, Charles Schmelzle, an employee of respondent was in the tool crib and overheard the conversation. Mr. Schmelzle recalled that claimant had advised the supervisor that it wasn't his job to run the shaker table and that he would run it on first shift but not on third. Mr. Schmelzle specifically testified:

> Q. Did you hear Joe Wood ever tell Dan Atzenweiler that he wasn't going to run the shaker table because he was on restrictions and it would hurt his hands?
>
> A. No. I took it that he didn't want to run it because they had him on that shift. If he was on the other shift he would run it, that because he was on that shift he wasn't going to run it because it wasn't his job on that shift.[2]

Later that evening when the claimant was called into his supervisor's office the parties again dispute what was said. The claimant's supervisor testified that claimant was again advised he was being ordered to run the shaker table and that if he refused he was subject to suspension and possible termination from his job. The claimant testified that he told the supervisor that he could not do the shaker job because of his permanent work restrictions. The supervisor denies claimant said he could not do the shaker table job by himself or that claimant said he could not do the job because it would hurt his hands.

It is undisputed that claimant asked to see a union representative and Mr. Norris was called, whereupon the claimant and Mr. Norris had a private conversation. Mr. Norris specifically recalled that the claimant never told him he could not do the shaker table job because it would hurt his hands.[3] Moreover, although the claimant did advise Mr. Norris that he had restrictions, it was Mr. Norris' recollection that claimant advised him he could not air arc weld which was a different job. Mr. Norris clarified that when the claimant told him he wasn't supposed to do the shaker table job it was because he considered himself a crane operator on the third shift.

Lastly, it should be noted that a few days earlier when the claimant advised the supervisor that he could not do the chain job because it would hurt his hands, the

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[2]Deposition of Charles Schmelzle, August 23, 2000; pp.8-9.

[3]Deposition of William Norris, Jr., August 23, 2000; pp.7-8.

supervisor had told him to return to his other duties. Had claimant made the same allegations regarding the shaker table on September 3, 1999, the logical inference to draw would be that the same supervisor would have accommodated the claimant as he had previously done.

The preponderance of the evidence supports the determination that the claimant did not advise his supervisor that he could not do the shaker table job because of his work restrictions. Because his termination was for cause unrelated to his permanent work restrictions, the claimant is limited to his functional disability.

As previously noted, the parties agreed at oral argument before the Board that the only testimony in the record regarding the claimant's functional impairment was provided by Dr. Bieri. The parties further agreed that the doctor opined that the claimant sustained a 14 percent permanent partial functional impairment to the whole body as noted by the Administrative Law Judge in his award. Accordingly, the award computation will be modified to reflect a 14 percent functional impairment rather than the 15 percent utilized by the Administrative Law Judge in calculating the award.

In addition, pursuant to the agreement of the parties at the oral argument before the Board, the cost of the videotaped deposition of Clint Wisdom, dated June 15, 2000, is assessed to the claimant.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Bryce D. Benedict dated September 19, 2000, is modified to reflect that the claimant sustained a 14 percent permanent partial functional impairment to the whole body and the cost of videotaping the deposition of Clint Wisdom is assessed to the claimant. The Award is affirmed in all other respects.

The claimant is entitled to 58.10 weeks permanent partial disability at the rate of $366 per week or $21,264.60 for a 14 percent permanent partial general disability making a total award of $21,264.60 which is due, owing and ordered paid in one lump sum less amounts previously paid.

IT IS SO ORDERED.

Dated this _____ day of May 2001.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

pc: George H. Pearson, Attorney, Topeka, Kansas
John B. Rathmel, Attorney, Overland Park, Kansas
Bryce D. Benedict, Administrative Law Judge
Philip S. Harness, Workers Compensation Director